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No. 90-1677

IN THE

Supreme Court of the United States

October Term, 1990

JOHN F. STARNS,
BEVERLY J. STARNS, AND
JEFFREY A. STARNS,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF OF AMICUS CURIAE ASSOCIATION OF TRIAL LAWYERS OF AMERICA IN SUPPORT OF PETITIONERS

Michael C. Maher, Esq.
1050 31st St., N.W.
Washington, DC 20007
(202) 965-3500
President, Association of Trial Lawyers of America

Jeffrey Robert White*
1050 31st St., N.W.
Washington, D.C. 20007
(202) 965-3500
Attorney for Amicus Curiae
*Counsel of Record

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IN SUPPORT OF PETITIONERS**

IDENTITY AND INTEREST OF AMICUS CURIAE

The Association of Trial Lawyers of America ["ATLA"] respectfully submits this Brief of Amicus Curiae in support of Petitioner in this case. Letters evidencing the consent of all parties to the filing of this brief have been filed with the Court.

ATLA is a voluntary national bar association whose 65,000 members primarily represent injured plaintiffs in personal injury suits, including medical malpractice actions. The victims of tortious misconduct cannot be identified in advance. There is a strong temptation for legislators to grant special benefits to powerful interests at the expense of future plaintiffs who have no voice to raise in protest. ATLA has sought to serve as that voice.

Judicial deference to legislative judgments is necessarily broad. But it is not unbounded. The constitution limits the authority of legislatures to trade away the rights of powerless minorities precisely because the political process cannot safeguard those rights. When legislatures violate those boundaries, it is not usurpation for courts to declare those acts invalid. It is the judicial responsibility in a government of a people that has chosen to guard freedom by imposing checks and balances on the guardians.

For these reasons, ATLA has participated as amicus curiae in cases challenging the constitutionality of legislative caps on damages in tort actions. ATLA does so again in this case.

REASONS FOR GRANTING THE WRIT

I. THE CONSTITUTIONALITY OF STATUTORY LIMITS ON RECOVERABLE DAMAGES IN TORT ACTIONS IS AN IMPORTANT QUESTION OF FEDERAL LAW WHICH SHOULD BE DECIDED BY THIS COURT.

Amicus supports the petition for a writ of certiorari to review the lower court's decision to apply the Virginia cap on damages, Va. Code Ann. § 8.01-581-15 (1984), in an action arising under the Federal Tort Claims Act. Amicus respectfully suggests, however, that this case presents issues of constitutional magnitude. Amicus submits that the

Virginia cap on medical malpractice damages is inapplicable because it violates the Due Process and Equal Protection guarantees of the Fourteenth Amendment.

Petitioner advances this ground without extended discussion. See Petition at 63. The constitutional infirmity of the damage cap was not a central issue at trial. At that time, the district court had already declared the ceiling on damages unconstitutional. *Boyd v. Bulala*, 647 F. Supp. 781 (W.D. Va. 1986), *aff'd on rehearing*, 672 F. Supp. 915 (1987). Nevertheless, the issue was raised and decided on appeal. Indeed, the Fourth Circuit certified questions to the Virginia Supreme Court as to the constitutionality of the statute under the Virginia and United States constitutions and adopted the state court's affirmative answer. *Starns v. United States*, 923 F.2d 34, 36 (4th Cir. 1991). The court had previously rejected arguments that the damage limit violated equal protection. *Boyd v. Bulala*, 887 F.2d 1191 (4th Cir. 1989).

Amicus suggests that the constitutionality of state statutes imposing limits on damages recoverable in tort actions is an important question of federal law which has not been, but should be settled by this Court. *See* S. Ct. Rule 17.1(c).

First, the Virginia statute is but a single instance of "tort reform" legislation which swept across the country in a wave in the mid-1970's and again in the 1980's. Nearly every state legislature enacted some restriction on the common law rights traditionally accorded to injured victims of medical malpractice. Twenty states imposed caps on the amount of damages that victims could recover from wrongdoers. *See* Farrell, *Virginia's Medical Malpractice Cap and the Doctrine of Substantive Due Process*, 23 Tort & Ins. L.J. 684 (1988)(listing state statutes). The constitutionality of these statutes will most certainly be drawn into question in federal courts, either in diversity actions, such as *Boyd v. Bulala, supra*, or in suits against the United States, such as

the present case. This Court should provide guidance to the federal courts faced with resolving difficult constitutional issues.

Second, a significant number of state courts have addressed the constitutionality of damage caps. The great weight of authority of state supreme courts holds that such limits are invalid as violative of state constitutional guarantees, including the state constitutional counterparts to the Due Process and Equal Protection Clauses. *See Smith v. Department of Insurance*, 507 So. 2d 1080 (Fla. 1987)($450,000 cap on noneconomic damages in all tort actions violates right of access to the courts and right to trial by jury); *Wright v. Central DuPage Hosp.*, 63 Ill. 2d 313, 347 N.E.2d 736 (Ill. 1976)($500,000 cap on all medical malpractice damages violates state constitutional ban against special legislation); *Kansas Malpractice Victims Coalition v. Bell*, 757 P.2d 251 (Kan. 1988)($1 million cap on all medical malpractice damages and $250,000 cap on noneconomic damages violates state constitutional guarantees of access to courts and jury trial); *Carson v. Maurer,* 120 N.H. 925, 424 A.2d 825 (N.H. 1980)($250,000 limit on noneconomic damages in medical malpractice cases violates equal protection); *Arneson v Olson*, 270 N.W.2d 125 (N.D. 1978)($300,000 cap discriminates against malpractice victims in violation of equal protection and due process provisions of the state and federal constitutions); *Reynolds v. Porter*, 760 P.2d 816 (Okla. 1988)(limiting malpractice victims to economic damages in cases filed over 3 years after occurrence violates guarantee against special legislation); *Lucas v. United States,* 757 S.W.2d 687 (Tex. 1988)($500,000 cap on all malpractice damages except medical expenses violates state constitutional right to a remedy); *cf., Jones v. State Bd. of Medicine*, 97 Idaho 859, 555 P.2d 399 (Idaho 1976), cert. den. 431 U.S. 914 (1977)(court remanded to determine whether damage cap violates prohibition against special legislation; trial court

held cap unconstitutional: Nos. 55527 & 55586, Ada County 4th Dist. Ct., Nov. 3, 1980)).

Three courts have upheld medical malpractice caps. *Fein v. Permanente Med. Group*, 38 Cal. 3d 137, 211 Cal. Rptr. 368, 695 P.2d 665 (1985), app. dism., 474 U.S. 895 (1985); *Johnson v. St. Vincent Hospital, Inc.*, 273 Ind. 374, 404 N.E.2d 585 (Ind. 1980); *Etheridge v. Medical Center Hosp.*, 376 S.E.2d 525 (Va. 1989).

State constitutions may, of course, grant broader rights than those mandated by the United States Constitution. It is somewhat anomalous, however, that on an issue of such significance which courts around the country must face with increasing frequency, federal and state judges must guess as to this Court's position.

Finally, it cannot be overlooked that this issue has been before this Court on a prior occasion. Following the decision by the California Supreme Court upholding that state's cap on noneconomic damages in medical malpractice cases, this Court granted review then dismissed the appeals "for want of a substantial federal question." *Fein v. Permanente Med. Group*, 38 Cal. 3d 137, 211 Cal. Rptr. 368, 695 P.2d 665 (1985), app. dism., 106 S. Ct. 214 (1985). Federal courts are divided as to the precedential weight of that disposition. *Compare Coburn v. Agustin*, 627 F. Supp. 983, 993 (D. Kan. 1985), stating that the dismissal indicates only approval of the outcome of the decision below, with *Ferguson v. Garmon*, 643 F. Supp. 335, 340 (D. Kan. 1986), which interpreted the dismissal as the equivalent of this Court's adoption of both the reasoning and result of the California opinion.

Amicus respectfully suggests that the speculation concerning the meaning of this Court's action in *Fein* reflects the need for a decision by this Court on the merits.

II. THIS CASE PRESENTS IMPORTANT ISSUES UNDER THE EQUAL PROTECTION CLAUSE WHICH THIS COURT SHOULD ADDRESS.

The constitutionality of the Virginia cap on damages has been called into question by several commentators. *See* Farrell, *Virginia's Medical Malpractice Cap and the Doctrine of Substantive Due Process*, 23 Tort & Ins. L.J. 684, 703 (1988); Taylor and Shields, *The Limitation on Recovery in Medical Negligence cases in Virginia*, 16 U. Rich. L. Rev. 799, 813 (1982); Harlan, *Virginia's New Medical Malpractice Review Panel and Some Questions It Raises*, 11 U. Richmond L. Rev. 51, 66 (1976).

A primary basis for these concerns is the blatantly pretextual nature of the legislature's expressed purpose. The preamble of the statute declares that liability insurance has become unaffordable or unavailable to Virginia physicians, threatening the supply of doctors willing to practice in Virginia, and necessitating a limit on the liability of health care providers. Quoted in Petition at 53. However, the legislators had before them the report of the State Corporation Commission, which regulates insurance carriers in the state. The report and testimony by the Insurance Commission clearly stated that liability insurance was readily available in Virginia, that premiums were not unaffordable compared to income and that the number of doctors in Virginia was steadily growing. Most significantly, during the period covered, 1970-75, there was no verdict over $500,000 and only two in excess of $150,000. In other words, the $750,000 cap could not have any effect on liability premiums. This background to the statute is set out in detail in Taylor and Shields, *supra*.

The damage limit is discriminatory on its face, applying only to victims of medical malpractice and only to the most severely injured. Amicus suggests that, even if this classification is subject to the rational basis standard of

review, it cannot pass constitutional muster. This Court's decision in *City of Cleburne v. Cleburne Living Center, Inc*, 473 U.S. 432 (1985), makes it clear that courts may not accept a purported objective which is at odds with the real world in which the statute operates. Amicus submits that the question of the limits of traditional deference to legislative judgment is an important issue which this Court should address.

III. THIS CASE PRESENTS IMPORTANT ISSUES OF SUBSTANTIVE DUE PROCESS WHICH THIS COURT SHOULD ADDRESS.

In his dissent from this Court's dismissal in *Fein*, Justice White called the Court's attention to an important issue which has remained unresolved.

> Whether due process requires a legislatively enacted compensation scheme to be a *quid pro quo* for the common-law or state-law remedy it replaces, and if so, how adequate it must be, thus appears to be an issue unresolved by this Court, and one which is dividing the appellate and higher courts of several states.

474 U.S. at 894-95.

Virginia's damage cap clearly curtails the common law remedy otherwise available to seriously injured malpractice victims. Just as clearly, it offers no *quid pro quo* in its place. This Court raised, but found it unnecessary to resolve this precise issue in *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 88 (1978). Amicus suggest that the Court should confront this important issue on review of this case.

CONCLUSION

For these reasons, amicus urges this Court to grant the Petition for a Writ of Certiorari in this case.

Respectfully submitted,

Jeffrey Robert White
1050 31st St., N.W.
Washington, D.C. 20007
(202) 965-3500
Attorney for Amicus Curiae
Association of Trial Lawyers of America

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